No. 05-11284

In The Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the pre-1991 Texas capital sentencing instructions – which permitted jurors to return only a "yes" or "no" answer to two "special issues" inquiring whether a defendant had killed "deliberately" and would probably constitute a "continuing threat to society" – deprive Mr. Cole of constitutionally adequate consideration of mitigating evidence about his mental impairment and childhood mistreatment and deprivation, in light of this Court's recognition in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment?

2. Do this Court's opinions in *Penry v. Johnson*, 532 U.S. 782 (2001), and *Smith* preclude the Fifth Circuit from adhering to its earlier decisions refusing to find error under *Penry v. Lynaugh*, 492 U.S. 302 (1989), whenever the pre-1991 special issues might have afforded some stunted consideration of a defendant's mitigating evidence?

3. Does the Fifth Circuit's insistence that a defendant's mental disorder must be severe, permanent or untreatable in order to qualify for relief under *Penry,* impermissibly resurrect the threshold test for "constitutional relevance" that this Court rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)?

CAPITAL CASE

QUESTIONS PRESENTED – Continued

4. When the prosecution repeatedly implored jurors to "follow the law" and "do their duty" by answering the former Texas special issues factually and refusing to fashion answers designed to produce an appropriate sentence, is there "a reasonable probability that the jury has applied the . . . [special-issues] instructions in a way that prevents the consideration of constitutionally relevant evidence," *Boyde v. California*, 494 U.S. 370, 380 (1990)?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court, with the exception that during part of the prior proceedings, other individuals (Gary Johnson, Janie Cockrell, and Douglas Dretke) served as the named Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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MISCELLANEOUS

OPINIONS BELOW

The Fifth Circuit's opinion, *Cole v. Dretke*, 418 F.3d 494 (5th Cir. 2005), appears at Joint Appendix ("JA") 219-50. Its opinion denying rehearing *en banc*, *Cole v. Dretke*, 443 F.3d 441 (5th Cir. 2006), appears as Appendix B to Petitioner's Petition for Writ of Certiorari. The District Court's unpublished order, *Cole v. Johnson*, No. 6:00-CV-014C (N.D. Tex., March 6, 2001), appears at JA 180-218.

JURISDICTION

The Fifth Circuit entered judgment on July 22, 2005, and denied a timely petition for rehearing *en banc* on March 17, 2006. *Cole*, 443 F.3d at 441. Petitioner filed for certiorari on May 30. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The relevant portion of the Eighth Amendment, which the Fourteenth incorporates, provides: "nor [shall] cruel and unusual punishments [be] inflicted." The text of the former Texas capital sentencing statute, Texas Code of Criminal Procedure Ann. art. 37.071, is set out at pages 1-2 of the Brief for Petitioner in the consolidated case of *Brewer v. Quarterman*, No. 05-11287.

STATEMENT OF THE CASE

A. Course of proceedings

On June 3, 1988, a Texas jury convicted Petitioner ("Mr. Cole")[1] of intentionally killing Raymond C. Richardson in the course of a robbery; the same jury returned affirmative answers to the two special issue questions submitted pursuant to former Tex. Code Crim. Proc. art. 37.071, and the court imposed the death sentence mandated by that statute.

Mr. Cole's conviction was affirmed on direct appeal. *Cole v. State*, No. 70,401 (Tex. Crim. App. Sept. 26, 1990) (unpublished), *cert. denied*, *Cole v. Texas*, 499 U.S. 982 (1991). The Court of Criminal Appeals of Texas ("CCA") denied post-conviction relief. *Ex parte Cole*, No. 41,674-01 (Tex. Crim. App. Nov. 24, 1999) (unpublished). *See* JA 149-77, 178-79.

Mr. Cole unsuccessfully sought habeas relief in Federal District Court. *See* JA 180-218. Mr. Cole appealed; the Fifth Circuit affirmed, denying a Certificate of Appealability ("COA") on his claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Cole. v. Dretke*, 99 Fed. Appx. 523 (5th Cir. 2004) (unpublished). This Court ordered reconsideration in light of *Tennard v. Dretke*, 542 U.S. 274 (2004). *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004). The Fifth Circuit granted a COA but adhered to its prior decision and refused rehearing *en banc* over dissent. *See* JA 219-50; *see Cole*, 443 F.3d at 441.

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[1] All relevant court documents and records in this case refer to Petitioner by his former name, Ted Calvin Cole. With Mr. Abdul-Kabir's permission, this brief will call him "Mr. Cole."

B. Facts material to the issues presented

The evidence at the guilt phase showed that Mr. Cole and two accomplices killed Raymond C. Richardson during a robbery. Mr. Cole's co-defendants were his step-brother Michael Hickey and Hickey's wife Christina, the victim's granddaughter. *See* XV RR 417-461.[2] Immediately before the crime, the three defendants were transients, "squatting" in an abandoned motel in San Angelo, Texas. XV RR 422. On December 13, 1987, the trio went to Richardson's house and visited with him for a couple of hours. *Id*. at 439. At some point, Cole took Richardson unawares, pushed him to the floor from behind, and strangled him with a dog leash while sitting on his back. *Id*. at 442-45. Michael Hickey took all the cash in Richardson's wallet – twenty dollars – and the three spent it on food. *Id*. at 295, 298, 449. The next morning, the Hickeys surrendered to police and implicated themselves and Mr. Cole. *Id*. at 454. By midafternoon, Mr. Cole had been arrested in Richardson's home and had confessed his own role in the crime. *Id*. at 292-99.

At punishment, the State presented evidence that Mr. Cole had gone to prison for the first time at age 16 after pleading guilty to murder. *See* XVII RR 697-710; *see also* State's Exhibits 36 (documents relating to Mr. Cole's 1974 murder conviction and resulting fifteen-year sentence).

[2] We cite the transcript of testimony from Mr. Cole's trial as "RR" ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "CR" ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary (defining "Clerk's Record" and "Reporter's Record").

The State also presented evidence that a few months after being released from serving his prison sentence for that murder, Mr. Cole was charged with two counts of aggravated sexual assault for having had sexual contact with two boys, aged eight and twelve. He confessed, pleaded guilty, and returned to prison in 1982. *See* XVII RR 740 and State's Exhibit 37. The State's final witness was psychiatrist Richard Coons, M.D., who testified that Mr. Cole's personality had "a number of sociopathic features" including a lack of remorse. JA 22-24. Dr. Coons testified that Mr. Cole's diary[3] showed him to be sexually attracted to young boys and reflected a "fantasy life" of compulsive attraction to criminal wrongdoing. JA 26. According to Dr. Coons, Mr. Cole's diary revealed inner thoughts obsessively preoccupied with "smuggling, stealing, robbing, raping, etcetera, [like a] modern-day viking[ ]." JA 26. Dr. Coons summed up that Mr. Cole could not profit from his experiences or learn from experience. JA 32.

The defense then presented extensive mitigating evidence establishing that Mr. Cole had been deprived, neglected, and abandoned as a child, as well as expert testimony about how that mistreatment had left him with enduring emotional and psychological scars. In addition, the defense presented expert testimony that Mr. Cole suffers likely neurological dysfunction that impairs his ability to control his impulses.

Nancy Doris Hickey, Mr. Cole's mother, described the trauma and despair that characterized her son's life. Mrs. Hickey was an alcoholic and her drinking made her unable

[3] The State had earlier introduced Mr. Cole's diary "on the issue of future dangerousness." XVII RR 683; *see* SX 34, 41.

to care for her children. JA 36. Shortly after Mr. Cole was born, his father was arrested for robbing a liquor store. JA 35. Before Mr. Cole was five years old, his father abandoned the family. JA 35-36. Mrs. Hickey described Mr. Cole's last meeting with his father:

> The last time he saw his father, his father brought him to San Angelo. He had took him off to Abilene and brought him to San Angelo and dropped him off a block from where he thought I lived and said, "Your mother lives down in that block. Go find her," and drove off. That's the last time he [saw] his father.

JA 42. Mr. Cole did not see his father again for ten years. *Id*.

Mrs. Hickey told the jury that after Mr. Cole's father abandoned the family, she worked at a "beer joint for three dollars a day and had two kids to feed." JA 36. Unable to manage her life and to care for her children, she took them to Oklahoma to live with her parents. *Id*. Mrs. Hickey's parents were also alcoholics and did not want her or the children to live with them. *Id*. Their house was eight miles outside town and Mr. Cole, then just five years old, was completely isolated from other children. The school buses did not run in that area and Mrs. Hickey's father refused to let her use his car to transport Mr. Cole to and from school. *Id.* Mr. Cole's mother therefore placed him in a church-run children's home. JA 37-38. Although Mr. Cole remained there for the next five years, his mother visited him only twice. *Id*.

Barbara Ann Dean, Mr. Cole's aunt, testified that when Mr. Cole visited her family as a child, on holidays during the five years he lived away from his family in the children's home, he seemed incapable of expressing his

feelings. JA 57. She added that Mr. Cole's father never visited him at all. JA 57.

Psychologist Jarvis Wright, Ph.D., who had spent more than ten hours interviewing and evaluating Mr. Cole on several different occasions, testified that Mr. Cole had endured a "very rugged, rough childhood." JA 67. In Dr. Wright's professional opinion, Mr. Cole showed evidence of having experienced "a bad, very painful background," and of continuing to endure great emotional pain as an adult. JA 68. Dr. Wright explained that Mr. Cole had "never felt loved and worthwhile in his life," and as a result experienced "terrific needs for nurturance" and suffered from a "fragmented personality" and "chronic depression." JA 67, 86. He also testified that Mr. Cole, while awaiting trial, was so "distressed" and "distraught" that he tried to kill himself by cutting his throat. JA 66.

In addition to the undisputed evidence of childhood neglect and abandonment, the jury also heard evidence that Mr. Cole suffered from diminished impulse control. JA 69. Dr. Wright attributed that impairment in part to Mr. Cole's "history" and "the pain in his life." JA 70. Dr. Wright also specifically identified as a separate cause of Mr. Cole's diminished impulse control a likely "neurological dysfunction in [his] central nervous system." JA 70. Dr. Wright diagnosed the latter condition based on a battery of psychological and neuropsychological tests administered by Dr. Wright prior to trial; on some such tests, Mr. Cole scored in the bottom five percent of the population. JA 63-66, 69, 75-78. As Dr. Wright explained,

> It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of Ted's background, all

> these other things, we're going to have an individual with some real problems with impulse control.

JA 69.

Dr. Wright testified that the combination of Mr. Cole's childhood history of neglect and abandonment and his neurological dysfunction had impaired Mr. Cole's judgment and his ability to control his behavior. JA 69-70. Dr. Wright testified that Mr. Cole's active fantasy life was at least in part a coping mechanism for dealing with the pain in his life, because Mr. Cole's early life experiences were so painful that he had erased memories of his childhood. JA 67, 70-72. Dr. Wright concluded by saying that although Mr. Cole started life with "fantastic raw material," (*i.e.*, high native intelligence),[4] the abandonment, neglect, and mistreatment he suffered as a child left his personality "very damaged" and "horribly" distorted. JA 73.

Dr. Wright speculated that Mr. Cole might eventually "burn out" and no longer constitute a threat to society. JA 69. In the meantime, however, because of Mr. Cole's lack of impulse control and the lasting emotional and psychological damage resulting from childhood mistreatment, Dr. Wright admitted that Mr. Cole was presently dangerous and would pose a threat until some point in time "years from now." JA 73-74; *see also id*. at 80 (admitting that Mr. Cole "absolutely" is more likely than the average person to "do something dangerous or antisocial or violent"); *id*. at 70 (Mr. Cole "very often can't behave in another way" than to give rein to his impulses).

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[4] Dr. Wright testified that Mr. Cole had a full-scale IQ of 121. JA 63.

The defense also called Dr. Wendell Dickerson, former chief mental health officer of the Texas prison system, to address "the issue of predicting behavior generally." JA 92. Dr. Dickerson asserted that predictions of future violence, grounded on whatever basis, tend to be wrong about one-third of the time. JA 94. He called violent conduct "overwhelmingly the province of the young," usually occurring before age twenty-five and being "really rare indeed" by age fifty. JA 95. Although he admitted that he had not examined Mr. Cole, he had reviewed the tests given by Dr. Wright. JA 96. Dr. Dickerson declined to offer an opinion about Mr. Cole's "tendencies of changing," JA 101, but expressed hope that Mr. Cole might not be dangerous "five, ten, fifteen years from now," because "whatever condition he is suffering from is not necessarily immutable and unchangeable." JA 102. Nevertheless, like Dr. Wright, he refused to say that Mr. Cole was "not dangerous." JA 101. Asked bluntly by the prosecutor whether Mr. Cole was a continuing threat to society, Dr. Dickerson tried to evade the question but ended up confirming that he would be "alarmed" and "concerned about the future danger" posed by Mr. Cole. JA 113.

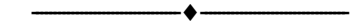
At closing, the prosecutor initially argued that the evidence compelled "yes" answers to both questions: "yes" to deliberateness because the crime had been planned in advance (as shown by Mr. Cole's diary) and "yes" to dangerousness based on Mr. Cole's prior history and other diary entries. JA 133-40. He said nothing about the circumstances of Mr. Cole's background or his mental impairment.

Defense counsel, during his turn, was unable to articulate any straightforward way for the jury to find that Mr. Cole's troubled background, mental and emotional problems, or neurologically based impulse control problems supported a "no" answer to the future dangerousness

question. Having been denied additional jury instructions, *see* JA 115-24 and XVII RR 855-59, defense counsel simply pleaded with the jurors to find some way to respond to the intuitive relevance of Mr. Cole's traumatic life history in deciding the appropriate punishment. *See* JA 142-45; *see also* Section A.4 *infra* (discussing closing argument in greater detail). Nowhere in his brief summation did defense counsel explain how Mr. Cole's background or mental impairment could sensibly support a "no" answer to the "future dangerousness" question. *See* JA 141-45.

The prosecutor responded in his final summation that the jury was called on solely to "answer those [special issue] questions correctly." JA 148. He firmly reminded the jurors that they had "promised" during voir dire to answer the special issues "yes" if the State "met its burden of proof." JA 145. He emphasized their "duty" to admit that the State had done just that. JA 147.

The jury unanimously found that Mr. Cole murdered Mr. Richardson "deliberately" and posed a "continuing threat to society," mandating a death sentence. *See* JA 127-28.



SUMMARY OF THE ARGUMENT

More than ten years ago, this Court reaffirmed in *Johnson v. Texas*, 509 U.S. 350, 369 (1993), that capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of whatever mitigating factors the defendant offers. *Accord Penry v. Johnson*, 532 U.S. 782, 797 (2001) ("*Penry II*"), *Smith v. Texas*, 543 U.S. 37, 46 (2004). The Texas system under which Mr. Cole was condemned gave his jurors no such opportunity in light of the sentencing instructions as

they functioned in the broader context of his trial. Just as in *Penry*, jurors were limited to the deliberateness and dangerousness special issues, which failed to address the relevant mitigating qualities of Mr. Cole's childhood neglect and mistreatment, his resulting mental and emotional impairments as an adult, and his diminished impulse control due to organic neurological dysfunction. Worse, and again as in *Penry*, the only commonsense inference to be drawn from his evidence in mitigation was that Mr. Cole would likely be dangerous in the future – as his own expert witnesses candidly acknowledged. And the prosecution exploited the facial narrowness of the inquiries of the special issues by insisting that jurors should focus solely on whether Mr. Cole was presently dangerous or would pose a dangerous threat in the future, rather than considering what potentially mitigating factors might account for or explain his dangerousness.

When the Fifth Circuit originally refused a COA on Mr. Cole's *Penry* claim, it did not have the benefit of *Tennard*. On remand from this Court, the Fifth Circuit ignored the lessons of *Tennard* in denying relief. First, it distinguished *Penry* on the basis of its own longstanding set of categorical rules according to which certain types of mitigating evidence are, by definition, non-problematic under the former special issue scheme. Because the mitigating evidence suggested that Mr. Cole's impairment was not necessarily permanent and did not indicate that he was incapable of "learning from his mistakes," the Fifth Circuit found Mr. Cole's evidence within the jury's effective reach in assessing his "future dangerousness." *See* JA 242. With respect to the evidence that Mr. Cole was neglected and abandoned as a child, the Fifth Circuit held that this

Court's decision in *Graham v. Collins*, 506 U.S. 461 (1993), "indicated that 'family background' evidence falls within the broad scope of Texas' special issues." JA 243.

Beyond applying these categorical rules, the Fifth Circuit relied on the fact that Mr. Cole's experts testified that violent offenders tend to "burn out" at some point after age forty. JA 240-42. Despite the fact that this aspect of their testimony was unconnected to the specific features of Mr. Cole's background, the Fifth Circuit held that the testimony of Mr. Cole's experts transformed the "future dangerousness" issue into a vehicle by which jurors could consider circumstances in Mr. Cole's background that made him a violent offender. JA 244. The Fifth Circuit did not explain how that characterization of the testimony could be reconciled with its earlier finding that Mr. Cole's own experts expressed such an unqualified view of his likely dangerousness that their testimony rendered harmless the improper admission of comparable testimony from a prosecution expert. *See Cole*, 99 Fed. Appx. at 531-32.

Neither of these rationales can withstand scrutiny. *Tennard* and *Penry* itself preclude the Fifth Circuit's reliance on categorical rules that treat all "non-permanent" mental disorders as outside *Penry*'s scope. This Court has made clear that to determine whether the jury could reasonably have given effect to mitigating evidence, a reviewing court must pay close and careful attention to the evidence, the instructions, and the context of the trial proceedings as a whole. *Boyde v. California*, 494 U.S. 370, 383 (1990); *Penry II*, 532 U.S. at 800-02. The Fifth Circuit's fallback position – that the testimony of Mr. Cole's experts provided a path to lead the jurors from Mr. Cole's background evidence to a "no" answer to the special issues – is unsupportable on the record. The primary

thrust of those witnesses' testimony was to account for Mr. Cole's violent behavior in terms of his tormented background and neurological dysfunction. To the extent that they expressed hope that he, like all violent offenders, might "burn out" eventually, such testimony is too thin a reed upon which to base a finding that the jurors could give Mr. Cole's mitigating evidence meaningful consideration in answering the "future dangerousness" question.

The decision of the CCA earlier in the case was equally at odds with this Court's precedents and demonstrably constituted an objectively unreasonable application of the Court's clearly established Federal law. Instead of heeding *Penry*'s command to examine Mr. Cole's particular mitigating evidence and determine whether, as a practical matter, the jury's instructions put that evidence beyond the jurors' "effective reach," the CCA first cited its *own* cases applying sweeping categorical rules purporting to define the limits of *Penry* and holding specifically that mitigating evidence could pose no *Penry* problem unless it was as severe as Penry's own and possessed an explicit causal "nexus" to the crime. Almost as an afterthought, the CCA also asserted that the testimony of Mr. Cole's experts gave the jury a sufficient vehicle for considering his mitigating evidence. Above and beyond its flawed methodology, the CCA's decision was objectively unreasonable under *Penry* because no principled distinction can be drawn between the circumstances of Mr. Cole's case and those which compelled this Court to grant relief in *Penry* itself.

Neither the Fifth Circuit nor the CCA ever confronted the constitutionally controlling question under *Penry* and *Johnson*: whether jurors could give meaningful consideration and effect to the mitigating qualities of Mr. Cole's

childhood neglect and abandonment, his resulting mental and emotional problems as an adult, and his diminished impulse control owing to both his background experiences and an organic neurological dysfunction. Neither court offered any factual explanation of how these specific mitigating circumstances could have been understood to make Mr. Cole *less dangerous*, so that they would have been within the jurors' reach in answering the "future dangerousness" issue. Realistically, as is apparent from the testimony of his own experts, Mr. Cole's mitigating evidence could have served only to support an inference that he *would* probably continue to be dangerous in the future. Because the former Texas special issues gave Mr. Cole's jurors no "meaningful basis" for considering the mitigating qualities of those factors but treated them as exclusively and decisively aggravating, Mr. Cole's death sentence cannot stand.

ARGUMENT

A. THE FORMER TEXAS SPECIAL ISSUES GAVE MR. COLE'S JURORS NO MEANINGFUL BASIS FOR GIVING EFFECT TO THE MITIGATING QUALITIES OF HIS CHILDHOOD MISTREATMENT, EMOTIONAL AND MENTAL DISORDERS, AND NEUROLOGICAL IMPAIRMENT.

1. Mr. Cole's mitigating evidence was extensive and powerful.

Mr. Cole's mitigating evidence included childhood deprivation, mental and emotional problems, and organic neurological impairment. This Court has expressly recognized that such circumstances can justifiably motivate jurors to impose a life sentence. Suffering deprivation or

mistreatment as a child is mitigating. *Hitchcock v. Dugger*, 481 U.S. 393, 398 (1987) (the "difficult circumstances" of the defendant's upbringing were mitigating, including the fact that he "had been one of seven children in a poor family that earned its living by picking cotton"); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (defendant "raised in a neglectful, sometimes even violent, family background").[5] This Court has also consistently reaffirmed that emotional problems or mental impairments are mitigating. *Eddings*, 455 U.S at 115 ("emotional disturbance"); *Bell v. Ohio*, 438 U.S. 637, 641-42 (1978) (defendant was "mentally deficient" due to "his drug problem and emotional instability"); *Penry*, 492 U.S. at 319 ("emotional and mental problems").[6] In addition, evidence that the defendant suffers from neurological damage or impairment has been recognized as mitigating. *See*, *e.g.*, *Mills v. Maryland*, 486 U.S. 367, 370 n.1 (1988) ("minimal brain damage").[7]

2. The "deliberateness" special issue afforded no vehicle for the jurors to consider and give effect to Mr. Cole's evidence.

The deliberateness inquiry afforded no vehicle for consideration of Mr. Cole's mitigating evidence because it did not require an assessment of his moral culpability. *Penry* recognized this basic shortcoming. *Penry*, 492 U.S.

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[5] *See also, e.g.*, *Parker v. Dugger*, 498 U.S. 308, 314 (1991).

[6] *See also, e.g.*, *Tennard,* 542 U.S. at 288; *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Buchanan v. Angelone*, 522 U.S. 269, 278 (1998); *McKoy v. North Carolina*, 494 U.S. 433, 437 (1990).

[7] *See also, e.g., California v. Ramos*, 463 U.S. 992, 995 n.2 (1983); *Florida v. Nixon*, 543 U.S. 175, 192 (2005); *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005); *Woodford v. Viscotti*, 537 U.S. 19 (2002) (*per curiam*).

at 322 ("Personal culpability is not solely a function of a defendant's capacity to act 'deliberately' "). Tellingly, since *Penry* this Court has never upheld a Texas death sentence on the theory that the "deliberateness" issue afforded adequate consideration of the defendant's evidence. Nor could it do so here.

There is no suggestion in *Penry* that the unadorned deliberateness question can enable meaningful consideration of the defendant's mitigating circumstances, because that inquiry fails to focus jurors on a broad assessment of the defendant's personal moral culpability. *See Penry*, 492 U.S. at 323.[8] Mr. Cole's jurors received no definition of "deliberately," *see* JA 125-29, and the State assured them that in the absence of any such instruction they were free to apply their own idiosyncratic understanding of the term. *See*, *e.g.*, VII RR 908 (prosecutor to juror Campos: since "deliberately" will not be defined, "you use your own common sense reason of what 'deliberately' may be").[9]

[8] The "deliberateness" question was originally designed to ensure that the *mens rea* of defendants convicted under a theory of vicarious liability satisfied the Eighth Amendment. Such a finding was necessary because, although a capital murder conviction in Texas typically requires an "intentional" killing, persons convicted under Texas' "law of parties" need not themselves have intended to kill. *See* Tex. Pen. Code §§7.01, 7.02. The post-*Penry* statute clarified this by substituting a new *mens rea* question applicable only to persons convicted under the "law of parties." *See* Tex. Crim. Proc. Code Ann. art. 37.071(2)(b)(2) (Vernon 2002). Given that the "deliberateness" inquiry was never intended as a vehicle for assessing moral culpability, it comes as no surprise that Texas courts came to treat it simply as confirming the presence of a culpable mental state vaguely "more than intent but . . . less than premeditation." *Bigby v. State*, 892 S.W.2d 864, 890 (Tex. Crim. App. 1994).

[9] *See also, e.g.,* IX RR 1301 (same, to juror Vogt); XI RR 1481 (same, to juror Golden); XIII RR 1915 (same, to juror Rocap); VIII RR 963 (prosecutor to juror Lewis: Lewis may use his "own personal

(Continued on following page)

Jurors may well have concluded that Mr. Cole committed the crime "deliberately" according to commonsense understandings of that term, yet they may also have concluded that Mr. Cole's deprived background, ensuing psychological and emotional problems, and neurological impairment reduced his moral culpability so as to make a death sentence unwarranted. *See Penry*, 492 U.S. at 322-23. Under those circumstances, their instructions required them to answer the "deliberateness" question in the affirmative, calling for a death sentence. In short, particularly against the background of the prosecutor's comments, the limited *mens rea* inquiry framed by the first special issue did not afford the jurors a meaningful vehicle for assessing Mr. Cole's moral culpability.

3. The "future dangerousness" special issue was not a vehicle for the jury to consider and give effect to the mitigating qualities of Mr. Cole's background of neglect, abandonment, and mistreatment; his resulting mental and emotional problems; or his organic neurological impairment.

Mr. Cole's evidence of childhood deprivation and mental impairment possessed the same relationship to the second special issue as Penry's evidence of an abused childhood and mental retardation. *See Tennard*, 542 U.S. at 288 (suggesting evident *Penry* error where "[t]he relationship between the special issues and Tennard's low IQ evidence ha[d] the same essential features as the relationship between the special issues and Penry's mental retardation evidence"). That is to

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definition" of deliberately); *id*. at 1085 (same, to juror Duncan); XI RR 1564 (same, to juror Beeson).

say, the circumstances of Mr. Cole's background offered as factors in mitigation tended to *explain*, rather than *rebut*, the strong inference of his present and probable future dangerousness. Had the defense offered those circumstances to disprove future dangerousness, one would expect Mr. Cole's primary expert witness, Dr. Wright, who described Mr. Cole's traumatic background and mental impairments in detail, to have offered jurors some basis for inferring that those features of Mr. Cole's background improved his prospects for rehabilitation or made it likely that he would develop into a non-dangerous person. Dr. Wright offered no such theory. Similarly, one would expect defense counsel to have provided jurors at closing argument some chain of reasoning to get them from the facts of Mr. Cole's traumatic background and mental impairment to a "no" answer to the second special issue. He did not. *See* JA 141-45. Both understood that the relevant mitigating qualities of Mr. Cole's background, like those of the evidence at issue in *Smith* and *Penry II*, had "little, if anything, to do with" the inquiry framed by the future dangerousness issue. *See Smith*, 543 U.S. at 48.

No court in this case has offered any theory of how a history of neglect, abandonment, and mistreatment as a child renders a defendant like Mr. Cole less dangerous, and common sense teaches exactly the opposite. Experts recognize that children subjected to maltreatment are likely to be impaired in their impulse control and thus are prone to acting out violently.[10] Lay experience confirms

[10] *See, e.g.*, Chris Mallett, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 No. 4 CRIM. LAW BULLETIN 3 (July 2003) at 2 (researchers have documented that "physical and psychological maltreatment" of children "is associated with aggressive behaviors").

this connection.[11] In this case, of course, jurors did not need to *infer* that Mr. Cole's ability to control his impulses was impaired, because they heard direct testimony to that effect from Dr. Wright. JA 69.

Impaired mental or psychological functioning likewise undermines a person's judgment and capacity to appreciate the appropriateness or likely consequences of his actions. *Penry* recognized that those features of mental impairment would tend to persuade jurors that the impaired defendant – a defendant like Mr. Cole – would likely be dangerous in the future. *See*, *e.g., Tennard*, 542 U.S. at 289. Yet the same aspects of mental impairment reduce the defendant's moral culpability and call the fitness of a death sentence into question. *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment) (a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment"); s*ee*, *e.g*., *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). A forced choice in answering the unadorned future dangerousness question "yes" or "no" gave jurors no way to express the conclusion that notwithstanding Mr. Cole's probable dangerousness, a death sentence would be excessive for him in light of his mental impairments and

[11] *See, e.g*., *Santosky v. Kramer*, 455 U.S. 745, 788-89 (1982) (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ., dissenting) ("It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline.").

traumatic childhood, and the bearing of those factors on his moral culpability for the crime. In this respect, too, this case is squarely controlled by *Penry*.

4. Prosecutors reinforced to the jurors that the special issues posed a narrow inquiry, and discouraged them from interpreting the special issues as authorizing a broad assessment of Mr. Cole's moral culpability or the appropriate sentence in light of all the evidence.

This Court has explained that in assessing whether a jury charge precluded the jury from considering or giving effect from a defendant's mitigating evidence, the reviewing court must consider the context of the entire trial. *See*, *e.g.*, *Boyde*, 494 U.S. at 380-83; *see also*, *e.g.*, *Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469 (2006) (modeling this analysis). One key part of that context is what the jurors were told, during voir dire and closing argument, about how to reach their decision. Here, the prosecutors told the jurors without qualification to answer the special issues literally and cautioned them not to undertake any broader inquiry into the defendant's culpability or consider the appropriateness of the sentence required by their factual "yes" or "no" answers to the "deliberateness" and "future dangerousness" questions.

Jurors received no indication that the "deliberateness" issue concerned anything other than the defendant's *mens rea* prior to the crime. Jurors were told that there was a distinction between killing "intentionally" (the *mens rea* applicable to the underlying capital offense under Tex. Pen. Code §19.03) and killing "deliberately," but that they were free to apply their own commonsense definition of the latter term in making that judgment. *See supra*. Such

guidance did not prepare jurors to view their answer to the "deliberateness" inquiry as expressing their judgment about Mr. Cole's personal moral culpability in light of his history of mistreatment as a child, his resulting psychological and emotional problems, and his neurological impairment. The prosecutors' closing argument regarding the first special issue reflected the same narrow perspective, emphasizing the degree of planning prior to the crime as sufficient to support an affirmative answer. *See*, *e.g.*, JA 132-33.

During voir dire, the prosecution also instructed the jurors that the "future dangerousness" question did not invite them to express their conclusion about the appropriate sentence in light of all the evidence. Rather, the prosecutors advised jurors that they were to exercise no discretion in answering either question; they were duty-bound to answer the questions strictly according to the evidence.

For example, the prosecutor elicited from juror Beeson her promise not to "substitute [her] opinion" about the appropriate punishment for Mr. Cole "for what the legislature has provided," *i.e.*, the answers to the special issues, because the legislature has chosen to limit "the scope of [her] consideration" to those inquiries alone. XI RR 1566-67; *see also* XI RR 1577 (juror Beeson instructed by prosecutor that she may not "find against the evidence" in answering the special issues "just because of the way you felt about the parties or about the crime." The prosecutor made clear to juror Beeson that she must put her views about the appropriate punishment "out of [her] mind":

> If a person had a bad upbringing, but looking at those special issues, you felt that they [sic] met the standards regarding deliberateness and being a continuing threat to society, could you still vote "yes," even though you felt like maybe they'd [sic]

> had a rough time as a kid? If you felt that the facts brought to you by the prosecution warranted a "yes" answer, could you *put that out of your mind and just go by the facts*?

XI RR 1588 (emphasis added). Similarly, the prosecutor explained to juror Rocap that the jury "in Texas does not say life or death," but must "answer[ ] those questions . . . to the best of their ability under their oath to judge the question and give the answer based on the evidence, regardless of what their personal preference might be as [to] what they'd like to see happen in the case." XIII RR 1900. He elicited juror Rocap's promise "not [to] skew the answer [to the special issue questions] to produce the desired result contrary to the evidence." XIII RR 1917. The prosecutor advised juror Clemmer, "[a]ll that you will be required to do is answer those questions"; he solicited her agreement that, "regardless of the circumstances, you know, the particular aspects of the case," she would answer "yes" as long as "the State meets its burden." VII RR 758. He similarly obtained agreements from juror Campos, VII RR 911, and juror Duncan, VIII RR 1084, that both would answer the special issues "yes" if the State met its burden of proof.

The punishment phase closing arguments of both parties likewise reinforced the inadequacy of the pre-1991 special issues as applied to Mr. Cole's mitigating evidence. Defense counsel began by saying that the "two issues" the jury faced were "whether he lives and . . . whether he dies," but acknowledged that "to get to that," the jury would "have to answer . . . two special issues." JA 141. He devoted a few sentences to the testimony of the defense experts, alluding to the testimony that "burnout" was a possibility at "forty, fifty, sixty years old" but admitting that "there's no guarantee of that." JA 142. The court

having denied his requested instructions on mitigating evidence, counsel was at a loss to articulate any straightforward way for the jury to reason from Mr. Cole's troubled background and impulse control problems to a "no" answer to either of the special issues. At best, defense counsel's argument amounted to a desperate plea that the jury nullify the special issues in order to give effect to the intuitive mitigating relevance of Mr. Cole's traumatic life history and neurological deficits. JA 142-43. Defense counsel briefly mentioned that the jurors could, in deciding the deliberateness question, consider the fact that nothing in Mr. Cole's diary indicated that the murder was "premeditated" or "thought out." JA 144. But then he abandoned any reference to the special issues, completing his plea as follows:

> There's only one question in this trial this afternoon – [and that] is whether he lives or dies.
>
> . . . Kelly Hickey . . . is just as guilty as Ted is. But she's going to the penitentiary for thirty years. The State is asking you to kill Ted. Can you in all good conscience do that?
>
> Look at all the evidence again. . . . Think about it, read it, mull it over . . . and decide Ted's fate. But believe it or not, he is a human being. . . . Can we in all good conscience sentence him to death?

JA 144-45. Nowhere in his brief summation did defense counsel urge that the evidence about how Mr. Cole was mistreated as a child, or the longstanding impairments he suffered as a consequence, or his central nervous system damage, logically could support a "no" answer to the "future dangerousness" question.

With his very first words in response, the prosecutor insisted that the jury focus solely on answering the special issues on their own terms:

> You promised the State on voir dire that you'd give a fair hearing both to the defendant and to the State. You also promised the State that, if it met its burden of proof, you would answer those questions "yes," to special issue number 1 and 2. And the State submits that it has met that burden.

JA 145. The prosecutor summed up his plea:

> Future dangerousness? Yes. Society has a right to protect itself. And the time is now for you to do your duty; and that duty is to admit the State has met its burden of proof in this case and to answer special issue number one "yes," and special issue number two "yes." That's what the evidence points to beyond a reasonable doubt, what you heard on this stand, what you will see – what you see in the paperwork. The time has come to act, and the time is to answer – please, this is a serious thing, and I'm not going to make light of it. It's a time for you to consider it all and make that decision and answer those questions correctly. But the State suggests – strongly urges and points to the evidence – the answer is "yes" to both those special issues.

JA 147-78. This argument is precisely the type of entreaty to which this Court pointed in *Penry* as reflecting the inadequacy of the pre-1991 special issues to permit meaningful consideration of mitigating evidence. *See Penry*, 492 U.S. at 325.

It is unsurprising that defense counsel never argued that Mr. Cole's childhood deprivation, resulting mental

and emotional problems, or neurological impairment could support an honest "no" answer to the "future dangerousness" question. To the extent that any of those conditions bore on his dangerousness at all, they made it more likely, rather than less, that he would act out violently in the future. Hence, defense counsel simply begged the jurors to do "[t]he right thing" by "answer[ing] those special issues in such a manner that he be sent to prison for life." JA 143. It is unlikely that the jurors would have thought they were free to express their reasoned judgment about Mr. Cole's reduced moral culpability by answering the "future dangerousness" question "no" where defense counsel never suggested any way they could do so without violating their oath to answer the questions honestly according to the evidence. This is especially so where both defense experts had conceded that Mr. Cole was presently dangerous and likely to remain that way for years, and the prosecutor emphasized the jurors' obligation to answer the special issues on their own terms. In the same vein, Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." *Penry*, 492 U.S. at 325.[12]

[12] Denied his requested instructions, defense counsel here, like his counterpart in *Penry*, was foreclosed from arguing that jurors could reason meaningfully from the nature of the mitigating evidence to a negative finding on the "future dangerousness" question. As a result, he simply pleaded for nullification. This Court has held that "nullification" is not an appropriate mechanism for accommodating the Eighth Amendment requirement of individualized sentencing, even when the jury charge explicitly authorizes that response. *Penry II*, 532 U.S. at 790; *Smith*, 543 U.S. at 45-48. If anything, the unadorned pre-1991 special issues afforded Mr. Cole – whose counsel could only plead with jurors to "do the right thing" by answering the special issues "in such a manner that he be sent to prison for life" – even less protection than the defendants in those cases.

B. THE FIFTH CIRCUIT MISAPPLIED THIS COURT'S *PENRY* JURISPRUDENCE IN HOLDING THAT THE JURORS, IN ASSESSING MR. COLE'S FUTURE DANGEROUSNESS, COULD GIVE MEANINGFUL MITIGATING EFFECT TO HIS EVIDENCE; IN FACT, JURORS COULD GIVE ONLY AGGRAVATING EFFECT TO THE EVIDENCE THAT MR. COLE WAS DEPRIVED, NEGLECTED, AND ABANDONED AS A CHILD, SUFFERED RESULTING MENTAL AND EMOTIONAL DISORDERS AS AN ADULT, AND THAT THOSE IMPAIRMENTS IN COMBINATION WITH AN ORGANIC NEUROLOGICAL DYSFUNCTION DIMINISHED HIS IMPULSE CONTROL AND JUDGMENT.

Despite this Court's remand for reconsideration in light of *Tennard*, the Fifth Circuit failed to consider whether the jury's instructions enabled it "to consider and give effect to . . . [Mr. Cole's particular] mitigating evidence," *Tennard*, 542 U.S. at 285 (quoting *Boyde*, 494 U.S. at 377-78). Under *Penry* and *Boyde*, that inquiry required attention to the specific mitigating evidence presented by Mr. Cole and whether it came within the reach of the special issues as they were likely to be understood "in light of all that ha[d] taken place in the trial," *Boyde*, 494 U.S. at 381; *accord Penry II*, 532 U.S. at 800-02. But instead the Fifth Circuit analyzed Mr. Cole's *Penry* claim within an abstract conceptual framework of its own making that treated large categories of mitigating evidence – such as any mental disorder that is arguably treatable or otherwise not necessarily permanent – as *ipso facto* within the jury's effective reach under the future dangerousness question. This mechanistic reasoning effectively resurrected the very "screening tests" this Court condemned in *Tennard*.

First, and notably, the Fifth Circuit altogether failed to examine the rejection of Mr. Cole's *Penry* claim by the Court of Criminal Appeals. Although the Fifth Circuit mentions in passing that Mr. Cole pressed his *Penry* claim in state post-conviction proceedings, *see* JA 221, it offers no analysis at all of how the CCA treated that *Penry* claim. Had the Fifth Circuit undertaken such an analysis, it would have found that the CCA rejected the claim pursuant to its own precedents requiring that a claimant under *Penry* demonstrate a "nexus" between his mitigating evidence and his crime, and further show that he suffered from mental impairment as "severe" as Penry's. *See* Section C.1 *infra*. These preconditions for applying *Penry* were, of course, condemned outright in *Tennard* as lacking any basis in this Court's jurisprudence. *See Tennard*, 542 U.S. at 284.

Second, the Fifth Circuit's analysis of the merits of Mr. Cole's *Penry* claim followed its longstanding practice of designating large, broadly-defined classes of evidence as categorically non-problematic under *Penry*. *See*, *e.g.*, *Robertson v. Cockrell*, 325 F.3d 243, 249-251 (5th Cir. 2003) (*en banc*) (noting that Texas capital defendants have attempted to invoke *Penry* regarding "many different types of mitigating evidence," including "subnormal intelligence," "troubled or abused childhood," "head injury," and "mental illness," and citing numerous cases denying relief in each category).[13] Repeatedly, the Fifth

[13] This approach rightly disquieted Judge Higginbotham. *See Robertson*, 325 F.3d at 258-59 (Higginbotham, J., concurring) (cautioning against "categorical characterization of . . . disabilities as transient or permanent," and calling it "judicial hubris" to "pronounce as a matter of law that even . . . severe child abuse creates only a transient condition").

Circuit has seized upon these sweeping classifications as the bases for threshold judgments that obviate the need to explain how the particular evidence in a given case could reasonably have been understood to support a finding of non-dangerousness. *See Tennard*, 542 U.S. at 283-84.[14] This is exactly the kind of foreshortened analysis this Court condemned in *Tennard*, because it derails the analysis called for by *Penry* and *Boyde*: an examination of whether there was a reasonable likelihood, in light of everything that happened at trial, that meaningful consideration was precluded.

This type of categorical reasoning drove the Fifth Circuit's rejection of Mr. Cole's *Penry* claim. The Fifth Circuit began its analysis by emphasizing that the evidence at Penry's trial showed that Penry's mental impairment "prevented him from learning from his mistakes." JA 239. The Fifth Circuit found that the evidence about Mr. Cole's childhood trauma, adult mental and emotional disorders and neurological impairment, in contrast, "did not suggest that [Mr. Cole] was unable to learn from his mistakes." JA 242. From this observation, the Fifth Circuit drew the insupportably broader conclusion that Mr. Cole's jurors would not have viewed his mitigating evidence as aggravating under the "future dangerousness" question because it did not show he "cannot learn from his mistakes." JA 242.[15]

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[14] *Tennard* did not end the practice. *See*, *e.g.*, *Garcia v. Quarterman*, 456 F.3d 463, 479 (Benavides, J., dissenting) (5th Cir. 2006).

[15] This same mistaken formulation taints other Fifth Circuit *Penry* cases. *See, e.g., Coble v. Dretke*, 444 F.3d 345, 362 (5th Cir. 2006) (distinguishing Coble's troubled childhood from Penry's because it did not cause any "mental impairment that prevented [Coble] from learning

(Continued on following page)

Nothing in *Tennard* supports the Fifth Circuit's view that the future dangerousness question is inadequate to permit consideration of mitigating circumstances *only* where the defendant suffers from a *cognitive* impairment that *altogether* prevents him from learning from his mistakes. This analysis, in fact, has much in common with Respondent's argument in *Tennard*. *See*, *e.g.*, Transcript of Oral Argument, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002), at 40-41 (Respondent's counsel: *Penry* error requires "evidence that's *solely aggravating* in answering those special issues, not necessarily evidence that . . . has some relevance outside those special issues, [but evidence that] *only has aggravating relevance* within them") (emphasis supplied). The same argument features prominently in the *Tennard* dissent. *See Tennard*, 542 U.S. at 293 (Rehnquist, C.J., dissenting) (*Penry* implicates only conditions which are "necessarily" aggravating with respect to future dangerousness). For that reason, it was particularly inappropriate on remand in light of *Tennard* for the Fifth Circuit to take this view.[16]

Tennard directs the reviewing court to consider whether the defendant's mitigating evidence *bears the same relationship as Penry's to the "deliberateness" and "dangerousness" issues*, not whether every aspect of the defendant's evidence is precisely the same as Penry's (*e.g.*, an inability to "learn from his mistakes"). There are many ways in which a defendant's impairments may make him dangerous, and inability to recognize one's mistakes is just

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from his mistakes," and "[i]t is this inability to learn from one's mistakes that suggests . . . future dangerousness").

[16] *See, e.g., Florida v. Meyers*, 466 U.S. 380, 382 (1984) (summarily reversing state court decision that had accepted an argument this Court had "expressly rejected" in resolving the same question).

one of them. A defendant with emotional or psychiatric disorders may be well aware that he is making the same "mistake" again but be unable to stop himself. Limiting the availability of relief under *Penry* to offenders with the first type of impairment (*e.g.*, cognitive disorders) rather than the second (*e.g.*, psychotic disorders), would render the "future dangerousness" question anything but a *reliable* means for jurors to give such evidence mitigating effect. *Graham*, 506 U.S. at 475; *accord Penry II*, *Smith*.

The Fifth Circuit employed similarly categorical reasoning in emphasizing that Mr. Cole's mental impairment was not necessarily a permanent condition. JA 242, 242 n.54. It has repeatedly offered the same rationale – identifying a defendant's mental disorder as "non-permanent," and then asserting that *any* non-permanent condition can by definition be given mitigating effect under the "future dangerousness" question – in numerous other cases. *See*, *e.g.*, *Coble*, 444 F.3d at 359-360 (because defendant's bipolar disorder and post-traumatic stress disorder were treatable, jurors could give them mitigating effect in assessing his future dangerousness, despite the fact that the defendant's own experts conceded that his disorders "would make him a continuing threat").[17] This inflexible rule that any "non-permanent" mental disorder is *per se* unproblematic under *Penry* effectively resurrects

[17] *See also, e.g.*, *Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir. 2001) (no *Penry* problem where defendant's mental illness was treatable); *Lucas v. Johnson*, 132 F.3d 1069, 1082-83 (5th Cir. 1998) (no *Penry* problem where defendant's schizophrenia "responded well to antipsychotic drugs"); *Robison v. Johnson*, 151 F.3d 256, 265 (5th Cir. 1998) (same, where defendant's schizophrenia was "in remission").

the "uniquely severe permanent handicap" threshold screening test this Court rejected in *Tennard*. *See* 542 U.S. at 289.[18]

Nor can this Court sustain the Fifth Circuit's holding that the testimony of Mr. Cole's experts brought the relevant mitigating qualities of his childhood mistreatment, mental and emotional disorders, neurological dysfunction, or diminished impulse control within the jurors' grasp in answering the future dangerousness question. *See* JA 239-43. The Fifth Circuit reasoned as follows in reaching that conclusion: First, it emphasized that Mr. Cole's own experts had testified that – "not now, but later in life" – "individuals who have had this kind of background . . . change. They burn out." JA 240. Second, it found that a juror who credited this part of the experts' testimony would have been able to honestly answer "no" to the future dangerousness question. JA 243-44 ("Specifically, the jury could have considered Cole's . . . organic deficiency evidence under – at the least – the future dangerousness special issue. Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole . . . may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future").

Contrary to the Fifth Circuit's characterization, Mr. Cole's experts for the most part offered only the unremarkable observation that violent individuals generally

[18] Moreover, contrary to the Fifth Circuit's comment that the evidence at Mr. Cole's trial "suggest[ed] that even someone with . . . an organic neurological deficiency changes later in life," JA 242, *none* of the expert testimony indicated that Mr. Cole's neurological dysfunction *itself* was "non-permanent." Such a condition, like the disabilities addressed in *Penry*, *Tennard,* and *Smith*, is in fact permanent.

become less likely to be violent as they age, and that one might hope Mr. Cole would follow the same arc. *See*, *e.g.*, JA 79, 74 (Dr. Wright's testimony that "research indicates that . . . individuals who commit violent [acts]" change as they grow older, in part because "the process of aging takes over, *as it does in all of us*") (emphasis added). Even if the jury credited that testimony, the mitigating inference that arises from it is true for *any* offender; it is a *generic* argument that speaks to the likelihood that most offenders become less dangerous as they grow older. This inference is no less true, in other words, of defendants who come from loving and supportive backgrounds and who lack any psychological or neurological impairment than it is of a defendant like Mr. Cole, shaped by a background of neglect and mistreatment and burdened by impaired impulse control and mental disorders. While the "future dangerousness" question may have been an adequate vehicle for the jury to give mitigating effect to generic evidence indicating that *all* defendants generally grow less violent as they age, it gave the jury *no* vehicle for expressing the conclusion that the unique constellation of mitigating circumstances present in Mr. Cole's background reduced his moral culpability for the crime so as to call for a life sentence.

Perhaps most troubling, it is only by ignoring the tenor of most of the testimony of Drs. Wright and Dickerson that the Fifth Circuit can suggest that their testimony held out hope for the jury that Mr. Cole might someday no longer pose a "continuing threat to society." Both Dr. Wright and Dr. Dickerson admitted that Mr. Cole was presently dangerous and was likely to be dangerous for a long time to come. Indeed, the Fifth Circuit *itself*, earlier in this case, acknowledged that point. When Mr. Cole was first before the Court of Appeals – when his

Penry claim was a dead letter owing to the Fifth Circuit screening tests this Court had yet to overturn in *Tennard* – he argued that he had been harmed by the improper admission of the testimony of prosecution psychiatrist Dr. Coons, who had examined Mr. Cole after indictment without notice to defense counsel. *See Cole*, 99 Fed. Appx. at 531-32. Explaining its view that any Sixth Amendment violation was harmless, the Fifth Circuit stated, "[t]he only direct future-dangerousness opinions offered at [the] penalty phase came from Cole's own experts, and *even they would not deny that he posed a risk of future dangerousness.*" *Id*. at 532 (emphasis added). It is impossible to square that characterization of the record – that Mr. Cole's own experts expressed the opinion that he was a future danger so strongly that the improper admission of Dr. Coons' testimony to the same effect was harmless – with the Fifth Circuit's subsequently expressed view that "the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future." JA 242. A full review of the testimony bears out the Fifth Circuit's original characterization – that the thrust of Dr. Wright's evaluation of Mr. Cole did not aim at rebutting his dangerousness but at *accounting for it* by reference to his childhood mistreatment, mental and emotional problems, and diminished impulse control due to neurological dysfunction.

In the final analysis, some of the experts' testimony indicated Mr. Cole might grow less dangerous with the passage of the years *for reasons unrelated to his mitigating circumstances* – for reasons that would apply, in Dr. Wright's words, to "all of us." The Fifth Circuit's view that this testimony presented the jury with an adequate vehicle for giving meaningful effect to the relevant mitigating qualities of the circumstances of Mr. Cole's background *as*

such is erroneous, as is its broader view that allowing jurors to consider and give effect to the "non-permanent" nature of a mental disorder is an acceptable substitute for allowing them to consider and give effect to the actual consequences of that disorder for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder that increases a defendant's dangerousness might make that disorder *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as potentially somewhat less aggravating.

The "signature qualities" of mental impairment – unlike those of youth, *see Johnson*, 509 U.S. at 368 – are not invariably transient. It would have been speculative at best for the jurors to assume that Mr. Cole's mental impairments, even if treated, would not in the future substantially impair his judgment or behavior in a way that would make him act out dangerously again. Certainly, jurors were not required to draw the inference that Mr. Cole would necessarily receive any such treatment or care in the prison system. In short, there was abundant evidence from which the jury "might well have" concluded, *see Tennard*, that Mr. Cole's mental impairment made him a future danger to society, regardless of any potential "treatability" of his psychological impairment.

Moreover, speculation about whether Mr. Cole's condition might eventually abate misses the point. The relevant mitigating quality of Mr. Cole's mental illness is not that it may be dormant at times in the future, or that it might be effectively treated in the future with some combination of medication and/or therapy. The relevant mitigating quality of Mr. Cole's mental disorder is that a reasonable juror could

have found that it made him *less culpable* for murdering Raymond Richardson. Yet, having concluded that Mr. Cole's psychiatric impairment undermined his culpability, the jurors would have had no reliable way to give effect to that judgment. As in *Penry*, the fact that Mr. Cole had mental and emotional disorders that combined with his organic neurological dysfunction to diminish his impulse control and judgment was relevant to dangerousness, if at all, only as aggravating, and Mr. Cole's chances of receiving a "no" answer would have been improved rather than diminished had that evidence never been placed before the jury.[19]

Nor do this Court's cases support the Fifth Circuit's ultimate conclusion that evidence of childhood mistreatment can be given meaningful mitigating effect in answering the future dangerousness question. First, of course, *Penry* itself recognized that the special issues were inadequate for Penry's own evidence of an abused childhood.[20] The Fifth Circuit's attempted limitation of *Penry* – by suggesting that in *Graham* this Court "indicated that 'family background' evidence falls within the broad scope

[19] *See* Brief for Petitioner in *Brewer v. Quarterman*, No. 05-11287, at 28-29 n.16.

[20] The view that childhood mistreatment can be given meaningful mitigating effect in assessing a defendant's dangerousness is also difficult to reconcile with *Williams*. Addressing whether Williams suffered prejudice from his counsel's failure to develop evidence of his abused background, this Court conceded that such evidence probably would not have precluded a finding of future dangerousness. 529 U.S. at 398. But the Court nonetheless found prejudice because evidence about Williams' deprived childhood could well have influenced the jury's appraisal of his moral culpability. *Williams* necessarily suggests that the most relevant mitigating qualities of childhood trauma and mistreatment have little to do with the defendant's likely future dangerousness.

of the special issues," JA 243 – distorts the holdings of both cases.

Because Graham sought relief in federal habeas, he was entitled only to the benefit of such law as existed when his conviction became final in 1984. *Teague v. Lane*, 489 U.S. 288 (1989). *Graham* thus focused on whether, in 1984, this Court's individualization decisions would have *dictated* the conclusion that Graham's youth and background evidence could not be given mitigating effect within the former special issues. *See Graham*, 506 U.S. at 477. Examining Graham's evidence and how it was presented and argued at trial, this Court found no individualization error. At the same time, its analysis in no way categorically ruled out all "family background evidence" as non-problematic under *Penry*. *See Smith*, 543 U.S at 48 (finding the former special issues an inadequate vehicle for considering mitigating evidence about Smith's troubled family background).

Graham's youth, being inevitably transient, bore straightforward mitigating relevance to the future dangerousness issue. *Graham*, 506 U.S. at 475-76. With respect to Graham's background, the Court emphasized that Graham "offered testimony concerning his upbringing and positive character traits" that painted him as a "real nice, respectable" person who "would pitch in on family chores" and buy food and clothes for his own children. *Graham*, 506 U.S. at 463-64. Graham's grandmother, with whom he had stayed from time to time as a child during his mother's periodic hospitalizations for a "nervous condition," attested that Graham was "never . . . violent or disrespectful," "attended church regularly," and "loved the Lord." *Id*. at 464. This portrayal permitted defense counsel to argue in closing that "Graham's criminal behavior [w]as aberrational," and counsel "vigorously urged the jury to

answer 'no' to the special issues based on this evidence." *Id*. at 464, 475.

Unlike Mr. Cole's case, *Graham* did not involve evidence of a *troubled* family background, marked by mistreatment, abandonment, and neglect, and this Court nowhere described the circumstances of Graham's background in those terms. Instead, Graham's evidence was offered to highlight his positive character traits and excellent prospects for rehabilitation. Thus framed, such evidence, like Graham's youth itself, had a natural tendency to support a "no" answer to the future dangerousness question. None of these aspects of *Graham* remotely resemble Mr. Cole's case, in which defense counsel presented evidence of Mr. Cole's traumatic childhood, mental and emotional problems, reduced impulse control, and organic neurological dysfunction to help jurors understand why he came to commit murder, rather than to emphasize his positive character traits and capacity for rehabilitation. These clear distinctions make the Fifth Circuit's strained attempt to invoke *Graham* to dismiss the evidence of Mr. Cole's traumatic childhood, and thereby to circumscribe *Penry*, wholly untenable.[21]

Neither party at Mr. Cole's trial made any argument that Mr. Cole's abused childhood logically warranted a "no" answer to the "future dangerousness" question, and there is no reason to assume that jurors would have drawn such

[21] The Fifth Circuit also cited *Johnson* as support for its denial of Mr. Cole's *Penry* claim, saying that *Johnson* "clarified" *Penry* by "confirm[ing] its limited scope." *Cole*, 418 F.3d at 505. This view of *Johnson* is not just erroneous but objectively unreasonable; *Johnson* expressly reaffirmed *Penry*'s holding as applied to evidence indistinguishable from Mr. Cole's. *See* Section C.2 *infra*.

a counter-intuitive inference on their own. *See* Section A.4 *supra*. Any speculation that the jury understood Mr. Cole's history of childhood mistreatment as reducing the likelihood of his "future dangerousness" would be inconsistent with both commonsense perceptions and judicial assessments of the relationship between abusive backgrounds and future dangerousness.[22]

Equally untenable is the Fifth Circuit's reliance on what it calls a "supplemental instruction" given to Mr. Cole's jury and which it says enhanced the jurors' ability to respond to his mitigating evidence in answering the special issues. That instruction read:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to the Special Issues hereby submitted to you.

JA 126. The Fifth Circuit described this "supplemental instruction" as being "almost word for word" the same as

[22] Childhood abuse is commonly understood to have long-term effects, *see, e.g., Williams*, 529 U.S. at 398; *Santosky*, 455 U.S. at 788-89 (dissenting opinion), and courts confronted with claims of ineffective assistance of counsel based on a defense attorney's failure to develop or present evidence of childhood abuse have often rejected those claims precisely because of the recognition that jurors may infer future dangerousness from such evidence. *See* Brief for Petitioner in *Brewer v. Quarterman*, No. 05-11287, at 27-28 n.15.

one given in *Johnson* and said that, unlike the "nullification instructions" struck down in *Penry II* and *Smith*, it contained no conflicting messages but unambiguously "instructed the jury to *consider* the mitigating evidence when deciding the special issues." JA 246 n.66.

This analysis is doubly flawed. First, the instructions given in *Cole* and in *Johnson* differ crucially in language and context. In *Johnson*, jurors were expressly directed to consider all evidence "*whether aggravating or mitigating in nature*." *Johnson*, 509 U.S. at 355 (emphasis added).[23] Johnson's mitigating evidence had unique relevance to the "future dangerousness" question and was presented and argued in a way that was aimed at persuading jurors of his excellent prospects for timely rehabilitation. *See* Section C *infra*. In *that* context, the presence of an additional instruction *that specifically referenced "mitigating" evidence* understandably reinforced this Court's conclusion that Johnson's jurors were not precluded from considering his evidence. In Mr. Cole's case, by contrast, the punishment-phase instructions made no mention whatsoever of "mitigating" evidence; and that omission, in the context of the testimony, *voir dire* examinations, and closing arguments at Mr. Cole's trial, *see* Section A *supra*, compels precisely the opposite conclusion.

[23] The instruction given to Johnson's jurors read: "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, *whether aggravating or mitigating in nature*, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues." *Johnson*, 509 U.S. at 355 (emphasis added).

Second, the instruction in question is not a "supplemental" instruction at all, but a standard instruction in Texas capital cases. The same instruction was given at Tennard's trial, *see* Joint Appendix, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 67, and at *Penry*'s original trial, *see* Joint Appendix, *Penry v. Lynaugh*, No. 87-6177 (O.T. 1987) at 26. This Court has never attached any significance to the instruction – which manifestly says and means only that the jury, in answering the special issues, should consider evidence admitted at both phases of the trial. The Fifth Circuit went seriously awry in treating it as broadening the scope of the special issues themselves, issues explicitly requiring yes-or-no "findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence . . . [Mr. Cole] presented," *Smith*, 543 U.S. at 48.

C. THE STATE COURT DECISION REJECTING MR. COLE'S *PENRY* CLAIM WAS OBJECTIVELY UNREASONABLE.

As we have noted above, the Fifth Circuit never examined the CCA's rationale for rejecting Mr. Cole's *Penry* claim on state post-conviction review; it simply conducted its own analysis – an incorrect one – in denying sentencing relief under *Penry*. Properly examined, the CCA decision is deeply flawed, "objectively unreasonable,"[24] in two respects. It relies centrally on the same "severity" and "nexus" limitations of *Penry* that this Court found indefensible in *Tennard*. *See* Section C.1 *infra*. And it reaches

[24] *Williams*, 529 U.S. at 409 (Justice O'Connor, speaking for the Court on this point).

a conclusion that constitutes an unreasonable application of *Penry* to the record of Mr. Cole's trial. *See* Section C.2 *infra*.

Evaluating both of these aspects of the CCA's decision begins with an identification of the rule of "clearly established Federal law, as determined by [this] Court" that the CCA was obliged to apply. 28 U.S.C. §2254(d). Namely, capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. *Johnson*, 509 U.S. at 369; *see also Graham*, 506 U.S. at 475 (the former special issues are unconstitutional as applied if they provide the jury "no reliable means of giving mitigating effect to that evidence").

1. The CCA's decision was objectively unreasonable because it rested on theories of mitigation that were baseless under *Penry*, *Johnson*, and *Graham*, and that this Court declared untenable in *Tennard*.

The state court decision rejecting Mr. Cole's *Penry* claim rested on two grounds.[25] First, the state courts employed the very type of threshold, categorical reasoning rejected in *Tennard*; despite acknowledging the wealth of

[25] The only state-court analysis of Mr. Cole's *Penry* claim comes from the convicting court, which entered "findings and conclusions" regarding all Mr. Cole's claims for relief. *See* JA 149-77. The CCA adopted the trial court's findings as to Mr. Cole's *Penry* claim *in toto*. *See* JA 179 ("[A]llegation sixteen," respecting which the CCA declined to adopt "the conclusion concerning all post-*Penry* cases," JA 179, is *not* the constitutional claim at issue here. The *Penry* claim that forms the basis for the present federal habeas action was allegation number one in Mr. Cole's state habeas application. *See* JA 154).

mitigating evidence presented at Mr. Cole's trial,[26] they dismissed the possibility of *Penry* error with the observation that evidence of "bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse [is] sufficiently considered under the special issues."[27] Second, the court maintained that the testimony of Mr. Cole's expert witnesses provided some basis for jurors to give effect to Mr. Cole's mitigating evidence. Both conclusions are objectively unreasonable.

The state courts' bald assertion that certain types of mitigating evidence – including evidence of "bad family background," "child abuse," and certain serious mental and emotional problems – pose no problems under *Penry* is rooted in the discredited test of constitutional relevance this Court rejected in *Tennard*.[28] The state cases cited for the proposition depend on the "nexus" and "severity" tests of constitutional relevance, and this Court has already deemed recourse to those tests objectively unreasonable.[29]

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[26] *See* JA 157-59.

[27] *See* JA 160.

[28] In tandem with the Texas cases relying on the discredited "nexus" and "severity" tests, the state courts also cited this Court's decision in *Graham*. *See* JA 159. As we have shown, *see* Section B *supra*, *Graham* provides no support for the argument that the former special issues invariably permitted adequate consideration of all types of background evidence, particularly evidence of a deprived or traumatic childhood.

[29] The state cases cited were *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1996); *Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994); and *Zimmerman v. State*, 881 S.W.2d 360 (Tex. Crim. App. 1994). *Garcia* did not require the CCA to interpret *Penry*, as Garcia's jury received a supplemental charge tracking the broad language of the current (post-*Penry*) Texas statute, which would have afforded consideration to any mitigating evidence presented. *Mines* and *Zimmerman*, however, rest squarely on the "severity" and "nexus" criteria condemned in *Tennard*. The CCA rejected Mines' *Penry* claim because his bipolar

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Where clear misstatements of the law form part of the basis for a state court decision, the state court decision as a whole is objectively unreasonable under 28 U.S.C. §2254(d). *See Williams v. Taylor*, 529 U.S. 362, 414 (2000) (treating a state-court decision as an unreasonable application of clearly established Federal law in part because the state court had erroneously identified *Lockhart v. Fretwell*, 506 U.S. 364 (1993), rather than *Strickland v. Washington*, 466 U.S. 668 (1984), as stating the test for "prejudice" in an ineffective-assistance-of-counsel case, and "[i]t is impossible to determine . . . the extent to which the [state court's] error . . . affected its ultimate finding [of] no prejudice"). Similarly, it is impossible here to identify what aspects of Mr. Cole's mitigating evidence the CCA viewed as irrelevant to the jury's sentencing decision "beyond the scope of the special issues" because that evidence failed the "severity" or "nexus" tests. Because the cases cited by the state court indicate it drew that conclusion with respect to at least some of Mr. Cole's mitigating evidence, however, *Williams* counsels this Court to treat the state courts' disposition of Mr. Cole's *Penry* claim as objectively unreasonable.[30]

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disorder was not a "long term mental illness that [would] preclude[ ] him from confirming his behavior to societal expectations." *Mines*, 888 S.W.2d at 817. It added that Mines had established no causal nexus between his illness and his crime. *Id*. at 818 n.2. Zimmerman presented mitigating evidence of a below-average IQ and "paranoid personality disorder," as well as testimony that he had grown up in a "very disruptive, uneven family environment" marked by abandonment and abuse. *Zimmerman*, 881 S.W.2d at 362. The CCA rejected Zimmerman's claimed mitigating circumstances as "not ris[ing] to the level of [those] in *Penry*," because he failed to show evidence of a "tangible mental defect"). *Id*. Zimmerman, too, failed to show any causal "nexus between his 'mitigating' evidence and his commission of the offense." *Id.* at 363.

[30] To be sure, the CCA's analysis is confusing and inconsistent from one case to another. Sometimes the CCA's "nexus" and "severity" tests

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The state courts were also unreasonable in rejecting Mr. Cole's *Penry* claim on the ground that the testimony of Drs. Wright and Dickerson provided some basis for the jury to have given consideration to Mr. Cole's mitigating evidence. *See* JA 160-61. As discussed in detail *supra*, the fact that these psychologists expressed some hope that Mr. Cole might "burn out" and become non-dangerous at some point as far distant as twenty years in the future[31] did not convert the "future dangerousness" question into a reliable vehicle for jurors to give effect to the relevant mitigating qualities of Mr. Cole's history of childhood mistreatment, his resulting mental and emotional disorders, and his organic neurological dysfunction. Neither the CCA nor anyone at trial suggested how the jurors could rationally

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appear as rigid threshold screens of constitutional relevance that make further *Penry* analysis unnecessary. *See, e.g., Zimmerman*. At other times, the CCA seems to cite its "nexus" and "severity" requirements as a sort of shorthand for its understanding of what kind of evidence would raise *Penry* problems under the special issues. But in the latter case, even when the CCA articulates what looks like the right question (*i.e.*, can this evidence be given effect within the special issues?), it conducts no analysis beyond asking whether the evidence is substantially identical to Penry's. In *Tennard*, for example, the CCA ultimately asserted that "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of [Tennard's] low IQ evidence." *Ex parte Tennard*, 960 S.W.2d 57, 63 (Tex. Crim. App. 1997). But as this Court later recognized, that outcome turned on what the CCA perceived as the categorical distinction between mental retardation and other kinds of impairment, not the relationship between Tennard's mitigating evidence and the special issues in the context of his trial. *Compare Tennard*, 960 S.W.2d at 60-61 (addressing in detail, under the subheading "Mental Retardation," why Tennard's 67 IQ did not mean that he was mentally retarded and hence within *Penry*'s scope), with *Tennard*, 542 U.S. at 288.

[31] Mr. Cole was about thirty years old at the time of trial. Dr. Dickerson speculated that "burnout" generally occurred by age fifty. *See* JA 95. Thus, it appears that all parties agreed that Mr. Cole's present dangerousness could continue for as much as two decades.

reason from that evidence to a "no" answer to the "future dangerousness" question; everyone at trial – including Mr. Cole's own expert witnesses – accepted that that evidence proved Mr. Cole's dangerousness for years to come. On this record, the CCA's decision denying *Penry* relief was objectively unreasonable.

2. The CCA's reasoning aside, the result it reached was objectively unreasonable because the jury lacked a "meaningful basis to consider the relevant mitigating qualities" of Mr. Cole's mitigating evidence in answering the special issue questions.

Even putting aside the objectively unreasonable analysis underlying the CCA's rejection of Mr. Cole's *Penry* claim, this Court cannot endorse the conclusion that the jury could give meaningful mitigating effect to Mr. Cole's history of childhood abuse and mental impairment in answering the future dangerousness issue. Simply put, it was objectively unreasonable for the CCA to find *Penry* relief foreclosed for Mr. Cole when he was, in principle, indistinguishably situated from Penry himself.

When the CCA rejected Mr. Cole's *Penry* claim in 1999, the "clearly established Federal law" from this Court relevant to his claim consisted primarily of *Jurek v. Texas*, 428 U.S. 262 (1976), *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), *Penry*, *Graham*, and *Johnson*. *Penry* pointed unambiguously to the result Mr. Cole urged, and nothing in *Jurek*, *Franklin*, *Graham* or *Johnson* should have changed that result, given that Mr. Cole had presented mitigating evidence that was indistinguishable in its relevant mitigating aspects from the mitigating evidence presented in *Penry* itself.

Penry held that mitigating evidence of mental retardation and childhood abuse could not be given meaningful mitigating consideration by a jury limited to the "deliberateness" and "future dangerousness" issues because such evidence lacked straightforward mitigating relevance to those issues. 492 U.S. at 328. Unlike the mitigating evidence presented in *Jurek* (relative youth, good work history, and aid to his family) or *Franklin* (the defendant's clean prison disciplinary record), the circumstances of Penry's background could well have been given *aggravating* effect under the future dangerousness issue. *Penry*, 492 U.S at 323-24. And although those factors bore some mitigating relevance to the "deliberateness" question, 492 U.S. at 322, their primary mitigating relevance in reducing Penry's moral culpability was not reliably captured by their logical relevance to whether he was capable of "deliberate" conduct as that term is commonly understood. Accordingly, this Court held that some instruction beyond the "deliberateness" and "dangerousness" issues was constitutionally required.

The second case that could have informed the CCA's evaluation of Mr. Cole's *Penry* claim was *Graham*. But for the reasons explained in Section B *supra*, *Graham* cannot save the CCA's rejection of Mr. Cole's *Penry* claim. Graham offered his background evidence to highlight his positive character traits and excellent prospects for rehabilitation. The thrust of Mr. Cole's case in mitigation, by contrast, was that a childhood marked by neglect and abandonment had left him suffering serious psychological and emotional torment as an adult, and that neurological dysfunction, in combination with that traumatic background, robbed him of the impulse control and judgment of a normal, unimpaired person. In short, the mitigating evidence here,

unlike in *Graham*, tried to offer an *explanation* for Mr. Cole's violent behavior.

Graham nowhere purported to modify or undermine *Penry*'s holding that jurors could give no meaningful effect to evidence of mental impairment or childhood mistreatment under the former special issues. Accordingly, if the CCA in 1999 thought *Graham* required it to deny *Penry* relief to Mr. Cole, that conclusion was objectively unreasonable.

The final potentially relevant precedent, *Johnson*, concerned exclusively whether Johnson's mitigating evidence of youth *simpliciter* had received meaningful consideration under the former Texas special issues. *Johnson*, 509 U.S. at 367 ("The question presented here is whether the Texas special issues allowed adequate consideration of petitioner's youth"). Thus, the Court was obliged to decide whether the reasoning of *Penry* extended to evidence of a defendant's youthful age without more. (Johnson was nineteen at the time of his crime). Embracing parts of the analysis in *Graham*, the Court concluded that "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient," and accordingly that the inevitably transitory nature of youth meant that the future dangerousness question could afford it meaningful consideration. 509 U.S. at 368.

Johnson had presented very little other background evidence. *See Johnson*, 509 U.S. at 356-57.[32] Given that the Court had granted review to decide solely whether youth

[32] That evidence indicated that Johnson had been a regular churchgoer as a child, that his mother died and his sister was murdered during his adolescence, that he was negatively influenced by bad friends and illegal drugs, and that he was remorseful for his crimes. *Id*.

could be given effect as mitigating under the former Texas special issues, it is not surprising that the Court did not address separately whether Johnson's other mitigating evidence required an additional instruction beyond the "deliberateness" and "future dangerousness" issues.[33]

More important, *Johnson* expressly reaffirmed the core holding of *Penry*. *Johnson*, 509 U.S. at 369 ("*Penry* remains the law and must be given a fair reading"). It cast no doubt on the insufficiency of the special issues in the context of mitigating evidence sharing the same essential features as Penry's evidence of mental impairment and child abuse. For that reason, if the CCA interpreted *Johnson* as a license to deny *Penry* relief in Mr. Cole's case, it was objectively unreasonable in doing so.

This court's decisions since *Graham* and *Johnson* are consistent in treating those opinions as not disturbing the core holding of *Penry*. Both *Penry II* and *Smith* rest on the principle that the jury's sentencing instructions must not exclude from meaningful consideration the "relevant

[33] Moreover, like Graham and unlike Mr. Cole, Johnson aimed his mitigating evidence directly at the "future dangerousness" question. *See Johnson*, 509 U.S. at 369 (Johnson's lawyer urged the jury to regard any negative consequences of Johnson's background as imminently "subject to change," and thus "readily comprehended as a mitigating factor in consideration of the second special issue"). Further, and again unlike Mr. Cole, Johnson did not object to the standard special issue questions as inadequate to permit consideration of his evidence, nor offer alternative instructions to broaden the scope of the jury's inquiry. *Id*. at 355, 358. Because Johnson explicitly directed his entire mitigating presentation to portraying himself as a teenager likely soon to mature into a non-dangerous adult – a prediction bolstered by evidence of prior good character and remorse for the crime – this Court concluded that the future dangerousness issue gave the jury a meaningful vehicle for responding to his youth.

mitigating qualities" of the defendant's evidence. Regardless of the precise terms in which the test is framed, its central requirement is that the jury must have a "reliable means for giving mitigating effect to [the defendant's] evidence." *Graham*, 506 U.S. at 475. In the context of this case, Mr. Cole's jury had no such "reliable means" for expressing the conclusion that a sentence less than death was the appropriate punishment for a defendant with a history of childhood neglect and abandonment, emotional and psychological impairment, and diminished impulse control due to neurological dysfunction. Neither the CCA nor the Fifth Circuit articulated any explanation of how those mitigating factors could be linked to "non-dangerousness" in a way that would make the "future dangerousness" question a sensible, direct way to give effect to their relevant mitigating qualities – because no such way exists.

The result in *Penry* turned on how Penry's mitigating evidence related to the special issues, rather than on any unique abstract quality of Penry's mitigating evidence itself. *See*, *e.g., Tennard*, 542 U.S. at 288 (finding that the relationship between Tennard's low IQ and the former special issues had the "same essential features" as those found to require relief in *Penry*). *Penry* clearly held that the relevant mitigating qualities of childhood deprivation – of abuse, mistreatment, abandonment, neglect, and the like – could not be meaningfully addressed via the special issues. Nothing in *Graham* or *Johnson* retreated from the core of *Penry*'s clear holding with respect to evidence of the destructive impact of such experiences in the defendant's background. Given that Mr. Cole's history of childhood mistreatment and his mental and emotional disorders as an adult, not to mention his organic neurological dysfunction, shared the same relevant mitigating qualities as

Penry's abused childhood and mental retardation, it was objectively unreasonable for the CCA to reach a different outcome in Mr. Cole's case than this Court reached in *Penry*.

3. Recognizing the CCA's decision in Mr. Cole's case as an objectively unreasonable reading of *Penry* does no violence to this Court's decisions giving the States wide latitude to guide how a capital jury considers mitigating evidence.

This point is demonstrated in Section C.3 of the Brief for Petitioner in the consolidated case of *Brewer v. Quarterman*, No. 05-11287, and we will not trespass on the Court's time by repeating that subpart here.

CONCLUSION

The Fifth Circuit's decision on remand in light of *Tennard* cannot be squared with *Tennard*. The Fifth Circuit relies on reasoning explicitly rejected in *Tennard* and, moreover, completely ignores that the CCA's decision rejecting Mr. Cole's *Penry* claim rested in substantial part on the same "nexus" and "severity" requirements that *Tennard* declared baseless. Mr. Cole's mitigating evidence bore no relationship to either of the two pre-1991 Texas special issues that were submitted to the jury as the sole determinants of his sentence. Furthermore, the prosecutor deliberately exploited the facial narrowness of the special issues by insisting that Mr. Cole's jurors answer them solely on the basis of the evidence, without regard to their consequences for the penalty to be imposed. Under these circumstances, the CCA applied *Penry* in an objectively

unreasonable manner in finding that the jury had any meaningful way under its instructions to respond to the relevant mitigating qualities of Mr. Cole's mistreatment as a child, the emotional and psychological damage which that traumatic history caused him as an adult, and the diminished impulse control Mr. Cole suffers due to the destructive combination of his turbulent personal history and an underlying organic neurological dysfunction.

Mr. Cole's death sentence violates *Penry*. This Court should reverse the Fifth Circuit and remand with instructions to grant habeas corpus relief.

Respectfully submitted,

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